

JURY TRIAL -- PEREMPTORY CHALLENGES -- Peremptory challenges -- *State v. Paleo* -- Argument against *Paleo*'s reasoning Revised 8/2001

The Court of Appeals has just held that *Batson*'s prohibition against purposeful racial or sex discrimination in the use of peremptory strikes in jury selection applies to the prosecutor's election *not* to use all of his peremptory strikes. *State v. Paleo*, ____ Ariz. ____, 5 P.3d 276 (App. 2000).

The reasoning of *Paleo* is suspect. *State v. Henry*, 191 Ariz. 283, 85-86, 955 P.2d 39, 41-42 (App. 1997), makes it clear that the person who challenges the strike has the burden of proving purposeful discrimination. But in *Paleo*, the Court of Appeals evidently assumes from the record that the prosecutor's nonuse of the strikes stemmed from a discriminatory motive, in the absence of any finding to that effect by the trial court and in the absence of any evidence supporting that conclusion. The Court's language makes this clear; the opinion says that the State's failure to use all of its challenges "may well show purposeful discrimination," and "could well lead to the conclusion that the prosecutor contrived" to force the remaining Hispanic off the panel. *State v. Paleo*, *id.* at & 11. In effect, the Court of Appeals found that the defense met its burden of showing purposeful discrimination simply because the Court of Appeals was not satisfied with the prosecutor's explanation. The Court's holding effectively presumes that the prosecutor acted with the intent to deny the defendant a fair jury, rather than that the prosecutor saw no reason to strike otherwise-qualified prospective jurors simply because they were not Hispanic. Thus, the Court of Appeals reversed *Paleo*'s conviction rather than remanding the case to the trial court so that the trial court judge could clarify his original statement.

In *Paleo*, the Court relied on *State v. Scholl*, 154 Ariz. 426, 743 P.2d 406 (App. 1987) as holding that "the prosecutor could discriminate by not using all available peremptory challenges." *State v. Paleo*, *id.* at & 8. However, as even *Scholl* held, a defendant has no express or implied right to have anyone of his own race or ethnic group on the jury. In *Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990), the United States Supreme Court stated that the fair cross-section requirement imposed on procedures for selecting the jury venire at large was designed to assure, "not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." *Id.* at 480, 110 S.Ct. at 807 [emphases in original].

It is also important to remember that *Batson* and its progeny do not merely exist to benefit the defendant, but also to protect prospective jurors from prejudice in jury selection. In *J.E.B. v. Alabama*, 511 U.S. 127, 128, 114 S.Ct. 1419, 1421, 128 L.Ed.2d 89 (1994), the United States Supreme Court stated that the Equal Protection clause affords potential jurors the right to selection procedures that are free from stereotypes rooted in historical prejudice. In *Paleo*, the State argued that, if the State must use all of its strikes and therefore is forced to strike juror A, an otherwise-acceptable member of group A, the State may be forced to discriminate against juror A to avoid being accused of not using all of the State's strikes to exclude a member of group B. In a footnote in *Paleo*, the Court of Appeals said that in such a situation, striking juror A would not be a "race or gender neutral" strike because "whether a party exercises a strike or not, it must provide a race-neutral reason." But in that situation, the prosecutor would be hard-pressed to truthfully provide a neutral, nondiscriminatory reason for excluding juror A.

The plain fact is that every prospective juror has a race, ethnic background, and sex. Denying anyone the right to be a juror based solely on his or her race, gender, ethnic group, or other such characteristic is discriminatory and unfair. *Paleo* thus forces the State into a "Catch-22" situation. The State must not discriminate against anyone based on his or her race, sex, or ethnic background. But if the State must use all of its strikes and thus strike juror A to avoid being accused of discriminating against the members of juror B's group, the State is forced to discriminate against juror A based solely on that juror's membership in group A. This flies in the face of *Batson*'s prohibition on discriminatory use of peremptory strikes.